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No. 1226

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

MARY LOUISE GRUMBLES, Joined by Her Husband, M. W. GRUMBLES; CATHRYNE S. HUDGINS, Joined by Her Husband, B. R. HUDGINS; and ROBERT HUDGINS,
Petitioners

v.

THE TIMES HERALD PRINTING COMPANY and JOHN W. RUNYON, CLYDE W. REMBERT and JAMES F. CHAMBERS, Trustees of the Voting Trust of the Stockholders of The Times Herald Printing Company, Dated December 15, 1960,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Judgment and Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Jurisdiction of the United States District Court	4
Reasons for Granting the Writ	5
Special Issue No. 3 (Materiality)	6
Special Issue No. 4 (Reliance)	10
Special Issue No. 5 (Damages) and No. 6 (Notice)	12
Conclusion	14
Proof of Service	15
Appendix A	
Opinion of United States Court of Appeals	A-1
Appendix B	
Charge of the Court	B-1
Judgment	-9

Cases **Page**

Janigan v. Taylor, 344 F(2) 781 (1st Cir., 1965), cert. den. 382 U.S. 879, 1965 11

List v. Fashion Park, Inc., 340 F(2) 457, 462 (2nd Cir., 1965) cert. den. U.S. 811, 1965 ..... 6, 10, 11

Myzel v. Fields, 386 F(2) 718, (1967) 12

Rogen v. Ilikon Corp., 361 F(2) 260, 266 (1st Cir., 1966) 6, 10

Ross v. Licht, 263 F. Supp. 395, 410 (SD, N.Y., 1967) 10

SEC v. Texas Gulf Sulphur Co. 258 F. Supp. 262, 280 (SDNY, 1966) 7

U.S. v. Harrell 133 F(2) 504, (8th Circuit) 10

Vine v. Beneficial Finance Co., 374 F(2) 627, 635 (2nd Cir., 1967) 10

Voege v. American Sumatra Tobacco Corp., 241 F. Supp. 369, 375, Del. 1965 11

Statutes and Rules

Securities Exchange Act of 1934
15 U.S.C.A., §78a-78jj 4
15 U.S.C.A., §78aa 4
15 U.S.C.A., §78j 4

Securities Exchange Commission Rule 10b-5, 17 CFR 240, 10B-5 ..... 2, 4, 5, 10, 11, 14

Texts

Bromberg Securities Law-Fraud SEC Rule 10b-5, §8.3 at p. 199 6
(Published 1967, McGraw-Hill Book Company, Library of Congress Card Number 67-24473)

Bromberg Securities Law, Fraud, SEC Rule 10b-5, §8.6(2) at p. 212 11
(Published 1967, McGraw-Hill Book Company, Library of Congress Card Number 67-24473)

3 Loss, Securities Regulations, 1765 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mary Louise Grumbles, Joined by her Husband, M. W. Grumbles; Cathryne S. Hudgins, Joined by her Husband, B. R. Hudgins; and Robert Hudgins, your Petitioners, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered January 4, 1968.

JUDGMENT AND OPINION BELOW

There was no formal opinion of the United States District Court, Northern District of Texas, Dallas Division. The charge and judgment of that Court are set out in Appendix B to this Petition.

The opinion of the Court of Appeals has not yet been reported; it is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered January 4, 1968, and Petition for Rehearing was denied February 13, 1968. The jurisdiction of this Court is invoked under 28 U.S. Code, §1254(1).

QUESTION PRESENTED

Whether the Trial Court's charge to the jury satisfied Securities Exchange Rule 10b-5 and other fundamental requirements of law in a nondisclosure case when:

(1) Materiality should have been determined as a matter of law;

(2) the issue of reliance should not have been submitted in a Rule 10b-5 nondisclosure situation;

(3) the court's instructions effectively deprived petitioners of a proper finding of their damages; and

(4) the submission of the question as to when petitioners learned or should have learned of the nondisclosed offer was not raised by the evidence?

STATEMENT OF THE CASE

The Times Herald Printing Company publishes the Dallas Times Herald, an afternoon newspaper, and operates the KRLD radio and television station in Dallas, Texas. It is a Texas corporation and its stock is closely held. It has not been sold in any established market. Over 50% of its stock is in a voting trust of which John W. Runyon (Chairman of the Board), James F. Chambers, Jr. (President) and Clyde W. Rembert (Senior Vice President and President of KRLD) were the voting trustees. The Voting Trust Agreement provided for self-perpetuation by the trustees and gave the company first call on any stock offered for sale (Plaintiffs' Exhibit 7 at R. 290).

The shares owned by Petitioners (51,534 shares or 8.9% of the total outstanding shares of 475,045) were not subject to the voting trust (R. 254), and controlled the election of one director (R. 251).

Petitioners, unsophisticated investors, employed a stock broker, Mr. Hickman, to appraise their stock in the Spring of 1961. After receiving his report (Plaintiffs' Exhibit 8 at R. 296) on June 7, 1961, they agreed to sell all their stock to The Times Herald Printing Company at $30.00 per share, the appraised price. The sale occurred on or about June 22, 1961. The broker did not inquire about prior or pending offers in making his investigation, and no offers were disclosed to him by the insider officers with whom he dealt. The broker received

a commission of ¾ of 1% of the sales price, or $11,595.15, whereas he was to receive only $2,500.00 if no sale was effected.

While negotiating with Petitioners through the broker, Hickman, the voting trustees and directors of The Times Herald Printing Company met on May 20, 1961 to consider an offer by S. I. Newhouse to purchase 51% or more of the company on the basis of a total price of $25,000,000.00 or *$43.47 per share*. The Board and Trustees resolved to reject the offer but, *in view of the importance of the offer*, to recommend to the stockholders that they approve the Board's view and authorize the Board to formally reject the offer. While other stockholders were advised, the Petitioners were not informed of the offer, or the Board's action, and sold their stock on June 22, 1961 at $30.00 per share to the voting trustees of The Times Herald Printing Company.

After learning for the first time in May, 1965, of the Newhouse and other offers made prior to their sale, Petitioners brought suit for rescission and/or damages. The trial was before the jury on the damages claim and judgment was rendered on the jury answers to special issues that Petitioners take nothing.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The case arose under the Securities Exchange Act of 1934, 15 U.S.C.A., §78a-78jj. Jurisdiction is particularly based on 15 U.S.C.A. §78aa, 15 U.S.C.A. §78j and Se-

curities Exchange Rule 10-b-5, 17 CFR 240. 10 B-5. Use of the mails invoked the federal statutes and Rule (R. 329-331).

REASONS FOR GRANTING THE WRIT

This case involves the proper application of Securities Exchange Commission Rule 10b-5, 17 CFR 240.10B-5, to a suit for civil damages based on fraudulent concealment. It is the contention of Petitioners that the trial court committed fundamental error in charging the jury and in failing to properly apply Rule 10b-5. The Rule follows:

> "Rule 10b-5. *Employment of Manipulative and Deceptive Devices*
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

The trial court refused certain key special issues requested by Petitioners (R. 580-582) and submitted issues in its charge (Appendix B) which failed to con-

form to the Rule and were not raised by the evidence. The court first inquired in Special Issues 1 and 2 as to whether an offer was made, and, if so, whether it was concealed. The jury found that S. I. Newhouse made an offer to purchase 51% or more of the outstanding stock on the basis of a $25,000,000.00 total price and that it was indeed concealed.

SPECIAL ISSUE NO. 3 (MATERIALITY)

Special Issue 3 inquired as to whether the concealment was material. The jury answered "no" (App. B, p. B-5). An accepted test of materiality is whether a "reasonable man would attach importance * * * in determining his choice of action in the transaction in question." *(Rogen v. Ilikon Corp.*, 361 F(2) 260, 266 (1st Cir., 1966); *List v. Fashion Park, Inc.*, 340 F(2) 457, 462 (2nd Cir., 1965) cert. den. 382 U.S. 811, 1965). See also *Bromberg, Securities Law-Fraud SEC Rule 10b-5*, §8.3 at p. 199 where the author refers to the jury's "*dubious*" conclusion of no materiality in this case. While materiality is clearly an element of proof under the Rule, there was no fact issue as to materiality. It was admitted by Respondents during the trial and in jury argument that the Newhouse offer was made and not revealed to Petitioners. That the offer was for 51% or more of the stock was likewise uncontested. Respondents contended that the offer was immaterial as Petitioners held only a minority interest of 8.9% of the total outstanding. Again, the stock ownership was undis-

puted. It should be considered that material information "need not be limited to information which is translatable into earnings * * *." *SEC v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262, 280 (SDNY), 1966). Likewise it was undisputed that The Times Herald Board of Directors met on May 20, 1961 while negotiations for purchase of Petitioners' stock were in progress (R. 305-307) and considered the Newhouse offer. The minutes (R. 305-307) recited the following:

> "MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF THE TIMES HERALD PRINTING COMPANY HELD AT ITS OFFICE IN THE CITY OF DALLAS, TEXAS, ON SATURDAY, MAY 20, 1961, AT 9:30 A.M.
>
> "The meeting was called to order by the Chairman of the Board, John W. Runyon. The following Directors were present: John W. Runyon, James F. Chambers, Jr., Clyde W. Rembert, Albert N. Jackson, Clyde A. Taber, Allen Merriam, B. C. Jefferson, Felix R. McKnight, George S. Johnson, Robert G. Payne and Orrin Miller.
>
> "A quorum being present, the meeting was declared open and ready for business.
>
> "Upon motion made by Director Albert N. Jackson and seconded by Director George S. Johnson, the reading of the minutes of the previous meeting of the Board of Directors was waived.
>
> "Mr. James F. Chambers, Jr., President, advised the Board of Directors of an offer by Samuel Irving Newhouse to buy the stock of The Times Herald Printing Company. All members of the Board of Directors expressed their views with reference to such offer. "The Voting Trustees stated, however,

that in view of the importance of this matter and in view of the fact that all individual stockholders might not be in agreement, it was planned that each individual stockholder would be apprised of this offer and would be given an opportunity to approve or disapprove the vote of the Voting Trustees.

"Upon motion made by James F. Chambers, Jr., and seconded by Albert N. Jackson, the following resolution was adopted by unanimous vote of the Board of Directors: RESOLUTION

"WHEREAS, an offer for the purchase of the stock of The Times Herald Printing Company, made by Samual Irving Newhouse of New York City, has been conveyed through the Republic National Bank of Dallas to the officers of The Times Herald Printing Company; and

"WHEREAS, such offer has been presented to the full Board of Directors of The Times Herald Printing Company and has been fully discussed and considered by said Board,

"NOW, THEREFORE, BE IT RESOLVED, by the Board of Directors of The Times Herald Printing Company that in the unanimous opinion of the members of said Board of Directors said offer is not acceptable and should not be accepted, and the Board of Directors hereby recommends to the stockholders of The Times Herald Printing Company that they approve this expression of the unanimous view of the Board of Directors and authorize the Board of Directors formally to reject said offer. "There being no further business to bring before the Board, the meeting was adjourned."

It was undisputed that the Newhouse offer referred to was to pay $25,000,000.00 for all of the stock or a pro-rata amount for 51% or more. In fact Mr. Stanley

Marcus testified that he had a cashier's check in hand for 25 or 30 million dollars with which to consumate the purchase. (R. 263-277). With no pertinent facts in dispute, materiality became a matter of law to be resolved by the Court. The Respondents admitted the "importance" of the matter in the minutes. The Court's definition of "Material" (Appendix B, p. B-3—B-4) included "important" as synonymous with "material." Thus it would seem inescapable that materiality was present as a matter of law. A simple informative phone call to Petitioners who lived in Dallas would have permitted them

> (1) to inquire of Newhouse if he wished to buy their minority interest, or
>
> (2) to attempt to persuade other stockholders to join them in a sale of 51% or more stock to Newhouse, or
>
> (3) to re-evaluate their stock and determine whether to demand more than $30.00 per share.

While it is true that the broker, Hickman, and the Respondents' expert, Mr. Cartwright, testified that $30.00 was a fair price, their testimony was based entirely on the financial and other data furnished by The Times Herald. Hickman testified that information as to the offer would have benefitted Petitioners (R. 256). Mr. Cartwright testified that what somebody will pay for stock is an *important* consideration (R. 428). It is

significant here that Respondents not only had a duty under the Rule to disclose material facts, but had a contractual duty to disclose the offer by virtue of the resolution of the Board of Directors.

It is submitted, therefore, that the Court should have either found materiality as a matter of law, or have disregarded the jury's negative finding as contrary to the overwhelming weight of the evidence. *U. S. v. Harrell* 133 F(2) 504, (8th Circuit).

SPECIAL ISSUE NO. 4 (RELIANCE)

Special issue No. 4 (App. B. p. B-5) inquired as to petitioners' reliance. Rule 10B-5 however does not by its terms require "reliance" to be proved. Nor does there appear to be a rational basis for reading this element into the Rule in *non-disclosure* cases. While some courts require reliance, they apparently are influenced by the common law fraud action which invariably included reliance as an element. [*Rogen v. Ilikon Corp.*, 361 F(2) 260, 266-268 (1st Cir., 1966), *List v. Fashion Park, Inc.*, 340 F(2) 457, 463 (2nd Cir., 1965), cert. den. 382 U.S. 811, 1965. See Also *Ross v. Licht*, 263 F. Supp. 395, 410 (SD, N.Y., 1967). In *Vine v. Beneficial Finance Co.*, 374 F(2) 627, 635 (2nd Cir. 1967], however, the court found reliance to be "unnecessary in the limited instance when no volitional act is required and the result of a forced sale is exactly that intended by the wrongdoers."

The difficulty is posed in the question, "how can a person rely on something unknown to him?" The court framed the issue thusly

> "Do you find * * * that such conduct, if any, in not disclosing the facts * * * was relied on by the Plaintiffs in selling their stock for $30.00 per share?" (App. B, p. 5).

It is submitted that as framed the issue defies clear understanding.

Bromberg *(Securities Law, Fraud, SEC Rule 10b-5,* suggests in §8.6(2) at p. 212 that an answer to the "reliance" question is to presume reliance from materiality *(Janigan v. Taylor,* 344 F(2) 781 (1st Cir., 1965), cert. den. 382 U.S. 879, 1968; *Voege v. American Sumatra Tobacco Corp.,* 241 F. Supp. 369, 375, Del. 1965). "It is more straightforward than requiring an empty pleading and proof, or playing word games with nondisclosure."

It is arguable that reliance is a necessary precedent to compensable damages. Where, however, a material nondisclosure is involved, it should only be necessary to prove that damages resulted. To add an additional element of proof (reliance) increases the Plaintiffs' burden over and above the requirements of the Rule.

Professor Loss (3 Loss, Securities Regulations, 1765) points out in nondisclosure cases that if reliance is a prerequisite of a Rule 10b-5 action, it is "little more than a

formal requirement." In *List v. Fashion Parks, Inc.*, 340 F(2) at 463, it is stated:

> "On the other hand, we do not agree with certain overtones in the opinion of the trial court concerning the meaning of 'reliance' in a case of non-disclosure under Rule 10b-5. The opinion intimates that the plaintiff must prove he actively relied on the silence of the defendant, either because he consciously had in mind the negative of the fact concealed, or perhaps because he deliberately put his trust in the advice of the defendant. Such a requirement, however, would unduly dilute the obligation of insiders to inform outsiders of all material facts, regardless of the sophistication or naivette of the persons with whom they are dealing. * * *

In *Myzel v. Fields*, 386 F(2) 718, (1967) at note 33, p. 739, it is stated:

> "Congress did not intend for the courts to become lost in conclusory language, but to effectuate the desirable ends of the Act."

It would seem that "reliance" should no longer be an element of proof under Rule 10B-5. A declaration to that effect by this honorable court would eliminate the apparent confusion in the Courts of Appeal.

SPECIAL ISSUES NO. 5 (DAMAGES) AND NO. 6 (NOTICE)

While Petitioners requested a damage issue (No. 7, R.582) inquiring as to the *true value* (there being no market) of the stock on the date of sale, this was refused. Instead, the court submitted damages in two is-

sues (Nos. 5 and 6, Appendix B, p. B-6). The court first inquired as to whether Petitioners were damaged. Only if answered affirmatively was the jury to answer the next issue (No. 6) which inquired as to the *fair market value* per share. The jury answered that Petitioners were not damaged and accordingly did not answer Special Issue No. 6. It should be noted here that the jury was instructed (Appendix B, p. B-6) that plaintiffs could not recover if petitioners knew or should have known of the offers prior to January 21, 1964. The question of notice was posed in Special Issue No. 7 (Appendix B, p. B-7) and the jury found that petitioners knew or should have known of the offer on May 20, 1961, the date of Board of Directors meeting at which the Newhouse offer was discussed. For the jury to make this finding, they had to assume immediate access to the Board minutes or a duty to daily inspect the complete corporate records. No such duty or access were proved.

Petitioners believe it was error for the court:

(1) to submit generally the question of damages, as only the value of the stock was pertinent, and

(2) to submit the value issue (No. 6) conditioned on an affirmative answer to the general issue, No. 5, when only the value was a material issue, and

(3) to instruct the jury that petitioners could not recover if they knew or should have known of the offers prior to January 21, 1964. There was *no evidence whatsoever* of any notification of any offer, nor opportunity to learn of any offer, on the

part of petitioners. Furthermore, this instruction undoubtedly misled the jury to believe they could find no damages if they answered Special Issue No. 7 with a date prior to January 21, 1964.

There being no evidence to support the submission of Special Issue No. 7 or the jury's answer thereto, and in light of the erroneous instruction given, petitioners were effectively deprived of findings on the damage question. There being no basis in the evidence for the instruction given, and no foundation in the Rule for the submission as made, petitioners were deprived of their fundamental right to a fair determination of their damages.

It is noteworthy that the trial court refused to admit testimony as to offers by the Dupont and Rollins interests based on 1962 financial data while admitting evidence of 1962 sales between insiders at $30.00 per share. These offers were each in the amount of $30,000,000 for all of the stock or $52.20 per share. (R. 459-460; 465-467; 474-476; 434-437; 543-545; 337). The Court of Appeals opinion said that this alleged error went "only to the question of damages" and this was without prejudice to petitioners as the jury decided there were no damages. (App. A, p. A-2). Again, this accents the effect of errors in the Court's charge heretofore specified.

CONCLUSION

The design of the law is to protect those who in large part are at the mercy of the artful and the cun-

ning — from the wiles and strategems of those on the inside who would profit by the power or the profits they would gain from their manipulative and deceptive devices.

The trial court's fundamental errors in submitting its Charge to the Jury and in not disregarding certain jury findings, and the Court of Appeals affirmance of the Judgment deprived petitioners of the protection provided by SEC Rule 10B-5 from the arrogance of corporate power exemplified by Respondents' conduct. Accordingly, this petition should be granted.

Respectfully submitted,

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PROOF OF SERVICE

This 11th day of March, 1968, I have mailed two (2) copies of PETITION FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to Mr. Jack Pew, Jr., Jackson, Walker, Winstead, Cantwell and Miller, First National Bank Building, Dallas, Texas, attorney for respondents.

.....

William F. Billings

APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 24407

MARY LOUISE GRUMBLES, Joined by her husband, M. W. GRUMBLES, ET. AL.
Appellants,

versus

THE TIMES HERALD PRINTING COMPANY, ET. AL.
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(January 4, 1968)

Before TUTTLE, GEWIN and GODBOLD, Circuit Judges.

PER CURIAM: This is an appeal from a judgment based on a jury verdict for the defendants in a suit brought by the appellants charging that the appellees were guilty of a violation of Rule X-10B-5, Securities and Exchange Commission, 17 C.F.R. 240.10B-5. The alleged violation occurred when the defendants in the trial court purchased the stock of the Times Herald Printing Company from the appellants without advis-

ing appellants of a certain material fact in connection with the sale, towit, the existence of "certain definite offers . . . to purchase all or a portion of the company stock at prices far in excess of $30 [the price at which the appellants sold] per share."

Except for rulings on admissibility of evidence, the issues were factual ones for the jury. These issues were all resolved against the appellants, having been presented to the jury in form of special issues. The jury having decided the issues of materiality, reliance by appellants, damages, and limitations against the plaintiffs, and it appearing that there was substantial evidence to support these findings, the jury verdict is final. Furthermore, the contention by the appellants that the trial court erred in not admitting evidence of certain offers made for 100% of the stock in subsequent years, goes only to the question of the amount of damages. The jury having decided that the appellants failed to prove the substance of their case of reliance and materiality of the withheld information, any error dealing with the refusal by the trial court to admit evidence showing the amount of damages would be without prejudice to the appellants, since no matter how much the damages might be proved to have been, the jury decided they were not entitled to any.

The judgment is AFFIRMED.

APPENDIX B

Charge of the Court

(Number and title omitted) (Filed: Nov. 2, 1966)

MEMBERS OF THE JURY:

In this case Plaintiffs are Mary Louise Grumbles, joined by her husband, M. W. Grumbles; Cathryne S. Hudgins, joined by her husband, B. R. Hudgins; and Robert Hudgins. Defendants are The Times Herald Printing Company and John W. Runyon, Clyde W. Rembert and James F. Chambers, Trustees of the Voting Trust of the Stockholders of The Times Herald Printing Company.

Plaintiffs Mary Louise Grumbles, *Catheryne* S. Hudgins and Robert Hudgins were each the owners of 17,178 shares of common stock of The Times Herald Printing Company prior to 1961. In 1961 they became interested in selling such stock and contacted J. W. Hickman, to investigate the value of the stock and report his opinion to them. In June 1961 he completed his report, placing a value of $30 per share on the stock. The stock was purchased by The Times Herald Printing Company acting through Trustees for $30 a share, the sale being consummated on or about June 21, 1961.

It is the contention of the Plaintiffs that The Times Herald Printing Company before the date of the sale by Plaintiffs had received offers to purchase a stock of The Times Herald Printing Company for a price in excess of $30 per share. It is their further contention

that The Times Herald Printing Company, its officers and employees failed to disclose these offers to the Plaintiffs, that such concealment was material and that if they had know of such offers they would not have sold their stock at $30 per share.

Plaintiffs ask for damages in an amount equal to the difference between what they received for their stock and its fair market value as contended by them on or about June 21, 1961.

It is the contention of The Times Herald Printing Company and the Voting Trustees that Plaintiffs and J. W. Hickman were permitted to examine all records of The Times Herald Printing Company and were furnished all information requested. It is their further contention that the circumstances surrounding previous offers were conditioned on acquisition of not less than 51% of the outstanding stock and that the value when 51% or more is acquired exceeds the value when less than 51% is acquired. It is the further contention of the Defendants that offers to purchase 51% or more of the stock were immaterial because that amount of stock was not for sale in any event. It is their further contention that Plaintiffs relied solely on the advice of J. W. Hickman.

The Plaintiffs owned approximately 9% of the stock of the Times Herald Printing Company, this percentage entitling an owner or owners of such stock to one director on the Board of Directors.

The issue in this case for your consideration is whether The Times Herald Printing Company, its officers or employees concealed material facts from the Plaintiffs which were relied upon to the damage of the Plaintiffs.

For the Plaintiffs to recover you must find by a preponderance of the evidence that in the negotiations leading up to the sale by the Plaintiffs of their stock in The Times Herald Printing Company, The Times Herald Printing Company, its officers or employees concealed material facts which conduct was relied upon by the Plaintiffs to their damage. If, however, you find by a preponderance of the evidence that Plaintiffs knew or in the exercise of reasonable care should have known of the offers, if any, set out in your answer to Special Issue No. 1 prior to January 21, 1964, the Plaintiffs cannot recover.

In connection with the foregoing instructions and the following special issues, you are instructed:

By the term "preponderance of the evidence" as used in this case is meant the greater weight and degree of credible testimony before you.

By the term "credible testimony" is meant that testimony which the Jury deem and find to be worthy of belief.

By the term "material" as used in this charge, I instruct you that for a fact to be material to a transaction,

it should be of solid or weighty character, substantial, of consequence, not to be dispensed with, important.

By the term "fair market value" as used in this charge is meant the price which property will sell for when offered for sale by a person who is willing to sell, but not required to sell to a purchaser who is willing to purchase, but who is not required to purchase, when both have reasonable knowledge of the facts.

Bearing in mind the foregoing instructions and definitions you will answer the following special issues in accordance with the instructions in connection with each special issue.

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that prior to June 21, 1961 S. I. Newhouse or John Cecil Mullins made an offer to purchase 51% or more of the outstanding stock of The Times Herald Printing Company on the basis of $25,000,000 for all of such stock?

Answer "yes" or "no" as to each party.

(A) S. I. Newhouse *Yes*

(B) John Cecil Mullins *No*

If you have answered either paragraph of special issue no. 1 "yes", then answer special issue no. 2. Otherwise, do not answer special issue no. 2.

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the Times Herald Printing Company, its officers

and employees failed to disclose to the Plaintiffs or J. W. Hickman the facts pertaining to such offer or offers, if any?

Answer "yes" or "no" as to each party.

(A) Mary Louise Grumbles *Yes* (B) M. W. Grumbles *Yes*

(C) Cathryne S. Hudgins *Yes* (D) B. R. Hudgins *Yes*

(E) Robert R. Hudgins *Yes* (F) J. W. Hickman *Yes*

If you have answered any of the paragraphs of special issue no. 2 "yes", then answer special issue no. 3. Otherwise, do not answer special issue no. 3.

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that such concealment, if any, was a material fact in connection with the sale of the stock involved herein:

Answer "yes" or "no" ANSWER: *No*

If you have answered any of the paragraphs of special issue no. 2 "Yes", then answer special issue no. 4. Otherwise, do not answer special issue no. 4.

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such conduct, if any, of the Times Herald Printing Company, its officers and employees, in not disclosing the facts, if any, pertaining to the offer or offers, if any,

was relied on by the Plaintiffs in selling their stock for $30 per share?

Answer as to each plaintiff.

(A) Mary Louise Grumbles *No*

(B) Cathryne S. Hudgins *No*

(C) Robert R. Hudgins *No*

If you have answered any one of the paragraphs of special issue no. 2 "yes", then answer special issue no. 5. Otherwise, do not answer special issue no. 5.

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the Plaintiffs, or any one of them, were damaged by the failure, if any, of The Times Herald Printing Company, its officers and employees, to disclose certain facts, if any?

Answer "yes" or "no" as to each party.

(A) Mary Louise Grumbles *No*

(B) Cathryne S. Hudgins *No*

(C) Robert R. Hudgins *No*

If you have answered any part of special issue no. 5 "yes", then answer special issue no. 6. Otherwise, do not answer special issue no. 6.

SPECIAL ISSUE NO. 6

From a preponderance of the evidence, what do you find the fair market value of Plaintiffs' shares of stock

in The Times Herald Printing Company to have been on a per share basis on or about June 21, 1961?

Answer in dollars, if any, and cents, if any.

Answer.....

SPECIAL ISSUE NO. 7

At what time do you find from a preponderance of the evidence did the Plaintiffs or any of them learn or in the exercise of reasonable care should have learned of the offers if any, to purchase Times Herald Company stock made prior to June 21, 1961?

Answer as to each party.	Approximately
(A) Mary Louise Grumbles	5/20/61
(B) Cathryne S. Hudgins	5/20/61
(C) Robert R. Hudgins	5/20/61

You are the sole judges of the facts, of the credibility of the witnesses and of the weight and credit to be given to the testimony, but the law you are bound to receive from the Court as it is given you herein, and be governed thereby. Arguments of Counsel are not in evidence, nor are they to be taken as correct statements of the law, if contrary to that which is given you by the Court.

You are further instructed that while you are deliberating upon your answers to the special issues that have been submitted to you, you will not mention or refer to, nor take into consideration any matter, fact or circumstance, other than the testimony that has been

admitted before you, all of which I instruct you particularly to observe and obey.

You are further instructed that each special issue must be answered by an unanimous vote of the Jury.

You will retire to the jury room, select your own foreman and write your answers to the special issues in the blank space left after each special issue for that purpose. Your foreman will sign the form of verdict as it is shown below.

/s/ SARAH T. HUGHES
U. S. District Judge

VERDICT:

We, the Jury, have answered the foregoing special issues as indicated above and herewith return the same into court as our verdict in this case.

/s/ RUTH A. MYCUE
Foreman of the Jury

Judgment

(Number and title omitted) (Filed: Nov. 14, 1966)

ON THE 31st day of October, 1966, came on to be heard the above entitled and numbered cause and came the Plaintiffs, MARY LOUISE GRUMBLES, CATHRYNE S. HUDGINS, B. R. HUDGINS and ROBERT HUDGINS, and each of them in person and by and through their attorneys of record, and came the Defendants, JOHN W. RUNYON, CLYDE W. REMBERT and JAMES F. CHAMBERS, in person and by and through their attorneys of record, and came THE TIMES HERALD PRINTING COMPANY by and through its attorneys of record, and all parties having announced ready, and jury demand having been timely filed under Rule 38, Federal Rules of Civil Procedure, and all parties having consented to submit all issues of fact to a jury, and the Court having so ordered, and a jury having been duly sworn and impaneled, and the Court having submitted interrogatories to the jury, and the jury having returned its verdict into open Court, and same having been accepted and approved by the Court and filed, and the Court being of the opinion that the Defendants, and each of them, are entitled to judgment that Plaintiffs take nothing, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that the Plaintiffs MARY LOUISE GRUMBLES, M. W. GRUMBLES, CATHRYNE S. HUDGINS, B. R. HUDGINS and ROBERT HUDGINS, and each of

them, take nothing against the Defendants, THE TIMES HERALD PRINTING COMPANY, JOHN W. RUNYON, CLYDE W. REMBERT and JAMES F. CHAMBERS, or any of them.

It is further ORDERED, ADJUDGED AND DECREED that costs of Court be, and the same are hereby, taxed against the Plaintiffs, and each of them, for which let execution issue.

SIGNED AND ENTERED this 10 day of November, 1966.

/s/ SARAH T. HUGHES
U. S. District Judge

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1226

MARY LOUISE GRUMBLES, Joined by her Husband, M. W. GRUMBLES; CATHRYNE S. HUDGINS, Joined by her Husband, B. R. HUDGINS; and ROBERT HUDGINS,
Petitioners,

v.

THE TIMES HERALD PRINTING COMPANY and JOHN W. RUNYON, CLYDE W. REMBERT, and JAMES F. CHAMBERS, Trustees of the Voting Trust of the Stockholders of The Times Herald Printing Company, Dated December 15, 1960,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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March 29, 1968.

INDEX

	Page
Opinion Below	1
The Nature of the Case, the Jury's Findings, and Petitioners' Failure to Preserve Error	2
Questions Presented	6
Statement	7
Argument	12
I. Special Issue No. 3: Materiality.	13
II. Special Issue No. 4: Reliance.	17
III. Special Issue No. 5: Damages.	19
IV. Special Issue No. 7: Limitations.	20
Conclusion	21
Proof of Service	23

Page

Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 11 S.Ct. 720 (1891) 16

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 82 S.Ct. 780, (1962) 17

Barron & Holtzoff, Federal Practice and Procedure, (Rev. Ed., 1961) 13, 21

Berenyi v. District Director, Imm. & Nat. Serv., 385 U.S. 630, 87 S.Ct. 666 (1967) 17

Berry v. United States, 312 U.S. 450, 61 S.Ct. 637 (1941) 16

Bromberg, Securities Law: Fraud (1967) 14, 20

Connelly v. Balkwill, 174 F.Supp. 49 (D.C. Ohio, 1959), aff., 279 F.2d 685 (6 Cir., 1960) 19

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404 (1962) 16

Federal Rules of Civil Procedure, Rule 49(a) 3

Federal Rules of Civil Procedure, Rule 51 ..... 18, 20

Guest House Motor Inn, Inc. v. Duke, 384 F.2d 927 (5 Cir., 1967) 18

Hooper v. Mountain States Securities Corporation 282 F.2d 195 (5 Cir., 1960), cert. den., 365 U.S. 814, 81 S.Ct. 695 (1961) 20

Janigan v. Taylor, 344 F.2d 781 (1 Cir., 1965), cert. den., 382 U.S. 879, 86 S.Ct. 163 (1965) 19

Kohler v. Kohler Co., 319 F.2d 634 (7 Cir., 1963) 14, 17, 19

Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740 (1946) 14

Page

List v. Fashion Park, Inc. 340 F.2d 457 (2 Cir., 1965), cert. den., 382 U.S. 811, 86 S.Ct. 23 (1965) 14, 19

Loss, Securities Regulation (2d Ed., 1961) 19

Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943) 18

Pennsylvania National Mutual Cas. Ins. Co. v. Nathan, 361 F.2d 18 (5 Cir., 1966) 13

Quinn v. Press, 135 Tex. 60, 140 S.W.2d 438 (1940) 20

Reed v. Riddle Airlines, Inc., 266 F.2d 314 (5 Cir., 1959) 19

Sartor v. Arkansas Gas Corp., 321 U.S. 620, 64 S.Ct. 724 (1944) 16

Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 76 S.Ct. 608 (1956) 15

S.E.C. Rule X-10B-5, 17 C.F.R. 240.10B-5 ..... 2, 14, 16, 18, 20

Solomon Dehydrating Company v. Guyton, 294 F.2d 439 (8 Cir., 1961), cert. den. 368 U.S. 929, 82 S.Ct. 366 (1961) 18

State v. Sunland Supply Co., 404 S.W.2d 316 (Tex. Sup., 1966) 5

U.S. Constitution, Seventh Amendment 22

In the

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MARY LOUISE GRUMBLES, Joined by her Husband, M. W. GRUMBLES; CATHRYNE S. HUDGINS, Joined by her Husband, B. R. HUDGINS; and ROBERT HUDGINS,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

To the Supreme Court of the United States:

OPINION BELOW

The opinion of the Fifth Circuit is reported at 387 F.2d 593 and is copied in Appendix "A" to the Petition for Writ of Certiorari.

THE NATURE OF THE CASE, THE JURY'S FINDINGS, AND PETITIONERS' FAILURE TO PRESERVE ERROR

The Petition for Writ of Certiorari seeks to overturn four separate jury findings of fact. Any one of these jury findings will support and compel the judgments of the courts below, that Petitioners take nothing from Respondents. None of the findings was complained of by Petitioners in the trial court. Each and all of them have been sustained by both the trial court and the Court of Appeals.

In 1961, Respondents purchased Petitioners' 8.9% interest in The Times Herald Printing Company for a consideration of $1,546,020.00 ($30.00 per share). In 1966, Petitioners brought this suit in the United States District Court for the Northern District of Texas, seeking damages or, alternatively, rescission of the sale (R. 550.) Petitioners' sole theory of recovery was and is the contention that Respondents, to Petitioners' damage, were guilty of a violation of Rule X-10B-5, Securities and Exchange Commission, *17 C.F.R. 240.10B-5.*[1] Speci-

[1]Rule X-10B-5 reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."
(17 C.F.R. 264.)

fically, it was alleged that Respondents had fraudulently omitted to advise Petitioners of material facts in connection with the sale — towit, the existence of "certain definite offers *** to purchase all or a portion of the company stock at prices far in excess of $30.00 per share" (R. 567) — and that, if Respondents had told Petitioners of such offers, Petitioners would not have sold their stock in 1961 but would have sold it "later" at $54.50 per share. (R. 569.) Respondents denied Petitioners' charges and pleaded the statute of limitations. (R. 572-576.)

At the trial, the "certain definite offers" alleged in Petitioners' pleadings turned out to be (1) an offer by S. I. Newhouse, evidenced by a letter of May 1, 1961, to buy 100% of the Company's stock for $25,000,000.00 ($43.47 per share) or, if 100% could not be delivered, to buy at least 51% or more of such stock at the same price per share, which offer had been promptly rejected by the holders of more than 51% of the stock, and (2) an offer claimed to have been made by one John C. Mullins, which "offer" is now out of the case because the jury found that it never existed (Special Issue No. 1B) and Petitioners have not challenged the finding.

The case was submitted to the jury on special interrogatories, as provided for by *Rule 49(a), Federal Rules of Civil Procedure.* The jury found that the Newhouse offer was made (Special Issue No. 1A) and

was not disclosed to Petitioners (Special Issue No. 2), but also found that the failure to advise Petitioners of such offer to buy no less than 51% of the Company, already rejected by more than 51% of its stockholders, was not a "material fact" in connection with the sale of Petitioners' 8.9% interest (Special Issue No. 3), that the non-disclosure of such offer was not relied upon by Petitioners in selling their stock for $30.00 per share (Special Issue No. 4), that Petitioners were not damaged by such nondisclosure (Special Issue No. 5), and that Petitioners, in the exercise of reasonable care, should have learned of the Newhouse offer on or before May 20, 1961, more than four years and eight months before they filed this suit (Special Issue No. 7). (R. 592-594.)[2] Thus, the jury found in favor of Respondents and against Petitioners upon each of the three essential elements of Petitioners' prima facie case — materiality, reliance, and damages — and also upon Respondents' defense of limitations.

Inasmuch as Petitioners now complain that "the issue of reliance should not have been submitted" and that the charge "deprived petitioners of a proper finding of their damages" (Petition for Writ of Certiorari 2), we call attention to the following. By Special Issues Nos. 3, 4, and 5, the trial court submitted interrogatories to the jury on materiality, reliance, and damages. (R. 592-594.) Petitioners' requested charge, though phrased somewhat differently from that of the court, also contained special interrogatories on materiality,

[2] Special Issue No. 6, submitted conditionally upon an affirmative answer to Special Issue No. 5, was not answered.

reliance, and damages. (R. 580-582.) When Petitioners were asked for their objections to the court's charge, only the following took place:

> "THE COURT:
>
> "Mr. Billings, do you have any objection to the Charge?
>
> "MR. BILLINGS:
>
> "Yes, Your Honor, Special Issue Number 4 we would object to and ask the Court to submit the special issue on reliance which was contained in our requested Charge, which was phrased somewhat differently.
>
> "Plaintiffs would object also to the submission of Special Issue Number 7 in that there was no evidence to raise this particular issue.
>
> "That's all the objections we have." (R. 24.)

Although Petitioners now claim that the answers to Special Issues Nos. 3 and 7 are contrary to the evidence, they made no motion for directed verdict or motion for judgment n.o.v., in the trial court.[3]

The trial court entered judgment on the verdict that Petitioners take nothing from Respondents. (R.596-597.) Petitioners appealed, contending that the verdict was contrary to the evidence,[4] but the Fifth Circuit affirmed.

---

[3] By alleging that the trial court committed "fundamental errors" (Petition for Writ of Certiorari 15), Petitioners tacitly recognize the difficulties confronting them on appeal. "Fundamental error" is the term given by the Texas courts to that rare species of error which may be assigned in the appellate court even though not preserved below. *State v. Sunland Supply Co., 404 S.W.2d 316, 319 (Tex. Sup., 1966).*

[4] Petitioners also claimed on appeal that certain evidentiary rulings by the trial court were erroneous. The Fifth Circuit held that the rulings, if error at all, were harmless, and Petitioners do not here complain of that holding.

QUESTIONS PRESENTED

In this Court, Petitioners do not deny that the jury findings on reliance and damages are supported by the evidence or that the special interrogatories on materiality and limitations are in proper form. Petitioners' only complaints (see the "Question Presented" section at Petition for Writ of Certiorari 2) are (1) that the jury's answers to the special interrogatories on materiality and the statute of limitations are contrary to the evidence, and (2) that the special interrogatories on reliance and damages were subject to objection. Thus, the questions presented by the Petition for Writ of Certiorari are as follows:

(1) Will this Court grant certiorari to review the jury's answers to two special interrogatories, when those answers have been concurred in by both the trial court and the Court of Appeals, when Petitioners have made no motion for directed verdict and no motion for judgment n.o.v. in the trial court, and when the judgments below are sustained by other jury findings which concededly have support in the evidence?

(2) Will this Court grant certiorari to review the language of two of the special interrogatories upon which the case was submitted to the jury, when Petitioners did not make any objection to those interrogatories in the trial court, and when the judgments below are sustained by answers to other special interrogatories not objected to here?

STATEMENT

The following summary of this 598-page record is necessary, as the Petition for Writ of Certiorari omits to mention much material evidence.[5]

As of 1961, Petitioner Mrs. Grumbles, her sister Petitioner Mrs. Hudgins, and her nephew Petitioner Robert Hudgins each owned 17,178 shares of stock in The Times Herald Printing Company, a total of 51,534 shares, 8.9% of the Company's 575,045 outstanding shares. (R. 46, 70, 126; Defendants' Exhibits Nos. 10(a) and 10(b).) Early in that year, Petitioners, on the advice of Robert Hudgins, then a finance student in college, decided to sell their Times Herald stock in an effort to diversify their investments. (R. 137).

There was then (as now) no public market for the stock. (R. 230.) Robert Hudgins first attempted to appraise his family's interest and concluded that it was worth $30.00 per share (R. 146-147), but he felt that someone with more experience should be consulted (R. 129), so Mr. J. W. Hickman, an investment banker since 1928 and President of the Dallas brokerage firm of Schneider, Bernet & Hickman (R. 228-229) was employed by Petitioners to make an appraisal and negotiate a sale of Petitioners' interest. (R. 232.) Pe-

[5] The summary may be condensed by omitting any reference to the alleged offer by John C. Mullins, since Petitioners do not now contend that such an offer was ever made.

titioners agreed to pay Mr. Hickman ¾ of 1% of the sale price, if he effectuated a sale; otherwise, he was to be paid a fee of $2,500.00 (R. 232, 239.) Thus, as Petitioners understood, the larger the price for which Mr. Hickman could negotiate a sale of Petitioners' interest, the greater would be his commission. (R. 57.)

Mr. Hickman and an associate proceeded to make an extensive investigation of The Times Herald Printing Company. (R. 235-238.) As Mr. Hickman demonstrated on the witness stand, he is fully acquainted with matters of corporate management. (R. 234-235.) Petitioners did not tell Mr. Hickman what to consider in his investigation, for "he was in the business," as Robert Hudgins said (R. 144), and Petitioners relied upon his judgment as to what considerations would be relevant. (R. 61, 66, 78.) On June 7, 1961, Mr. Hickman furnished Petitioners with a 36-page written report (Plaintiffs' Exhibit No. 8), which, after exploring such matters as the characteristics of the industry, the Company's business, its ownership, management, financial condition, and operating record, its stock's price/earnings ratio, book value, and dividend rate, and the considerations involved in a private placement as opposed to public marketing, concluded with the explicit assertion that Petitioners' 8.9% minority interest "could not be sold for more than" $30.00 per share. (R. 64, 241-244.) This was 13.6 times the Company's average per share earnings for the previous five years. (R. 244.)

Petitioners were satisfied with Mr. Hickman's report and decided to go ahead with the sale. (R. 149.) Mr. Hickman, as Petitioners' agent, "talked to" one outside investor as a potential buyer, and then, in June 1961, made The Times Herald Printing Company a firm offer to sell Petitioners' stock to the Company for $30.00 per share, the price specified in Mr. Hickman's appraisal. (R. 238, 298.) The offer was accepted, and Respondents Runyon, Rembert, and Chambers purchased the stock as Trustees. (R. 238, 298, 312.)*

During his investigation, Mr. Hickman and his associate had numerous visits with officials of The Times Herald Printing Company. Mr. Hickman testified that, insofar as possible, such officials furnished him with all the information he requested. (R. 235.) He recalled that, on several occasions, he and the Company officials had discussed, in general terms, the desirability of owning a company such as the Times Herald, but it was his duty to appraise and sell an 8.9% minority interest, and, therefore, knowing that "people will pay more for the control of a corporation in purchasing stock than they will for lesser interests" (R. 248), he was not concerned with and did not inquire whether there had ever been any offers to buy 51% or more of the Company. (R. 246.) Respondents did not mention

* Respondents Runyon, Rembert, and Chambers thereupon transferred 23,667 of the 51,534 shares to the Company's Retirement Pension Trust, and transferred the remaining 27,867 shares to the treasury of the Company, all at the same price of $30.00 per share they had paid Respondents. (R. 467.)

any such offers to Mr. Hickman: they were not securities experts, they knew Mr. Hickman was, and they did not know what factors Mr. Hickman intended to consider in making his appraisal. (R. 247, 341, 342.) Petitioners admitted they had no reason to believe Respondents would not have given them or Mr. Hickman such information, if it had been asked for. (R. 60, 150-151.)

Petitioners now claim, however, that they are entitled to damages or rescission because Respondents did not tell Mr. Hickman of a certain offer by S. I. Newhouse, owner of a large number of radio and TV stations and newspapers. (R. 195.) Mr. Newhouse had been interested since 1959 in acquiring control of The Times Herald Printing Company; in that year he had made and the controlling stockholders had rejected an offer to purchase at least 80% of the stock. (R. 211.) On May 1, 1961, his interest renewed, he tendered the offer now relied upon by Petitioners — a letter which stated that, assuming there had been no substantial changes in the Company's condition since 1959, he would "pay $25,000,000 for one hundred percent of its stock," or, failing that, "would accept fifty-one percent or more, on a proportionate basis." (R. 285.)

At a meeting on May 20, 1961, the Company's board of directors considered Mr. Newhouse's offer, recorded their unanimous opposition to it, and voted to recommend that the stockholders "approve this expression of the unanimous view of the Board of Directors and

authorize the Board of Directors formally to reject said offer." (R. 305-307.) In order to obtain such authorization, however, the directors did not have to contact all of the stockholders; since the persons who owned more than 51% of the Company were not interested in selling,[1] it became immediately apparent that the offer could not be met. (R. 169, 287, 321, 324, 459.) Mr. Newhouse had never made any offer for, and specifically testified that he did not want, less than 51% of the Times Herald. (R. 223.)

Thus, the offer claimed by Petitioners to be a "material fact" in connection with the sale of their stock was a rejected offer to purchase not less than 51% of The Times Herald Printing Company. Mr. Hickman himself, called as a witness by Petitioners, testified that he did not consider such an offer "as being material" to the value of Petitioners' 8.9% interest. (R. 249-250.) Another securities expert, E. O. Cartwright, senior vice president of Merrill Lynch, Pierce, Fenner & Smith (R. 394), also testified that the Newhouse offer was not material in connection with the sale of Petitioners' shares. (R. 401.)

As the foregoing summary shows, Petitioners' assertion, that "[w]hile other stockholders were advised, the Petitioners were not informed of the offer, or the Board's action" (Petition for Writ of Certiorari 4),

[1] John Runyon, Mrs. Lula Gooch, Clyde Taber, and Mrs. Ruth DeVarney together owned 52.33% of the stock (R. 456), and none of them wanted to sell. (R. 164, 354, 439, 449, 499, 522.)

does not recite all the facts which were before the jury. Neither the offer nor the board's action was concealed from Petitioners. Indeed, at the time of such offer and meeting, Petitioners' expert Mr. Hickman was investigating the Company, and the minutes of the May 20 directors' meeting, and of all other directors' meetings, were available for his inspection as Petitioners' agent. (R. 338.) It is undisputed that Respondents gave Mr. Hickman all the available information he asked for. (R. 235.)

Petitioners offered no evidence in support of their pleaded claim that if they had known of Mr. Newhouse's offer they would have retained their stock and "later sold it for at least $54.50 per share" (R. 569). On the day the trial began, they filed a "Supplement to First Amended Complaint," which alleged that the "true value of their stock" was "not less than $52.00 per share on June 21, 1961" (R. 580), but they did not present evidence in support of this allegation. Both Mr. Hickman and Mr. Cartwright testified that $30.00 per share was a fair price for Petitioners' 8.9% minority interest. (R. 249, 400.)

ARGUMENT

In order to obtain a reversal of the judgments below, Petitioners must overcome each and every one of the four controlling jury findings against them (Special Issue No. 3, materiality; Special Issue No. 4, reliance; Special Issue No. 5, damages; and Special Issue No.

7, limitations). We need examine only briefly the arguments by which they attempt to do this.

I. Special Issue No. 3: Materiality.

The first and complete answer to Petitioners' claim, that materiality was established as a matter of law and should not have been submitted to the jury, is that Petitioners are procedurally foreclosed from so contending, for they made no motion for directed verdict in the trial court. As noted in *2B Barron & Holtzoff, Federal Practice and Procedure, § 1081 (Rev. Ed., 1961):*

> "It is well established that the sufficiency of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court. There are sound reasons for this rule. The party who makes no motion for a directed verdict must be of the view that the evidence makes a case for the jury and should not be permitted to impute error to the court for sharing that view. The appellate court, therefore, is powerless to review the sufficiency of the evidence to support the verdict if the appellant made no motion for a directed verdict." (2B Barron & Holtzoff 424-425.)

The Fifth Circuit, to which the present case was appealed, has many times so held. See *Pennsylvania National Mutual Cas. Ins. Co. v Nathan, 361 F.2d 18, 20 (5 Cir., 1966)*, and the numerous authorities cited therein.

Apart from that, however, Petitioners' argument must fail on its merits. Mr. Hickman, Petitioners' agent

and Petitioners' expert witness, explicitly stated that the Newhouse offer was not material to the value of Petitioners' interest (R. 249-250), and his opinion was corroborated by the only other securities expert who testified. (R. 401.) This, to say the least, "is an evidentiary basis for" the answer to Special Issue No. 3, requiring that such answer be upheld on appeal, *Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740 (1946)*. Moreover, such answer is in accord with simple common sense. A fact is not material, under *Rule X-10B-5*, unless "in reasonable and objective contemplation" it is likely to affect the value of the plaintiff's stock. *List v. Fashion Park, Inc., 340 F.2d 457, 462 (2 Cir., 1965), cert. den., 382 U.S. 811, 86 S.Ct. 23 (1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir., 1963)*. Certainly, a jury can conclude that an offer to buy not less than 51% of a corporation, which offer has been unequivocally turned down by more than 51% of the stock ownership, does not in reasonable and objective contemplation affect the value of an 8.9% interest. Petitioners cite no testimony in this record to the contrary.[8]

Petitioners urge that if they had known of the Newhouse offer they could have (1) inquired of Mr. New-

[8] As noted at Petition for Writ of Certiorari 6, a recent text, without assigning any reasons for its conclusion, describes the jury's answer to Special Issue No. 3 in this case as "dubious." *Bromberg, Securities Law: Fraud § 8.3 (1967)*. Professor Bromberg does not say or suggest, however, that such answer should be set aside on appeal (let alone that this should be done in the absence of a motion for directed verdict); on the contrary he appears to recognize that the finding was warranted by the trial court's definition of "material" (R. 591), to which definition, as he observes, Petitioners did not object. *Ibid.*

house if he wished to buy their 8.9% interest, or (2) attempted to persuade other stockholders to join them in a sale of 51% or more of the stock to Mr. Newhouse, or (3) demanded more than $30.00 per share when they sold their stock; from these premises (and from these premises alone) Petitioners, entirely disregarding their own expert's contrary testimony, find it "inescapable" that the Newhouse offer was material to the sale of their interest. (Petition for Writ of Certiorari 9.) To this it may be answered that (1) Mr. Newhouse was not interested in buying Petitioners' or any other minority interest (R. 223), that (2) the holders of more than 51% of the stock were not interested in selling (R. 164, 354, 439, 449, 522), and that (3) there is no evidence any one was willing to pay more than $30.00 per share for Petitioners' interest — indeed, no evidence that any one other than the Company wanted to buy it at all. (R. 238.) The point now, however, is that Petitioners' argument is, at best, a line of reasoning which the jury perhaps might have accepted but did not; it was the jury's right and duty — indeed, the "very essence" of its function — "to select from among conflicting inferences and conclusions that which it considers most reasonable," *Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 526, 76 S.Ct. 608 (1956)*, and the jury has resolved this factual controversy in favor of Respondents. On appeal, the Court may consider only the evidence and inferences which support the jury's verdict. *Continental*

Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 82 S.Ct. 1404 (1962); Berry v. United States, 312 U.S. 450, 452-453, 61 S.Ct. 637 (1941).

Petitioners also claim that Respondents "admitted 'the importance' " of the Newhouse offer in the minutes of the May 20, 1961 directors' meeting. (See Petition for Writ of Certiorari 9.) There is, however nothing in those minutes or elsewhere in the evidence which in any way indicates that Respondents believed the Newhouse offer to be important to the purchase and sale of Petitioners' stock. The evidence plainly shows that, when the majority stockholders made it clear they would not sell, Respondents ceased to regard the offer as having any importance at all, because they knew it could never be met; this, the Company's president testified, is why the offer was not mentioned to Petitioners. (R. 324.)[9] The jury, exclusive judge of the credibility of the witnesses, *Sartor v. Arkansas Gas Corp., 321 U.S. 620, 628, 64 S.Ct. 724 (1944); Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S.Ct. 720 (1891)*, was entitled to believe this perfectly reasonable explanation, and apparently it did so.

As Petitioners admit, "materiality is clearly an element" of their proof. (Petition for Writ of Certiorari

[9] Petitioners pleaded that Respondents' failure to mention the Newhouse offer was "willful and deliberate, and misled plaintiff stockholders into selling their stock interest in the Defendant company at far less than its true value." (S. F. 568.) The evidence shows, however, that at the time the Newhouse offer was made and rejected, Petitioners had not even formally offered their stock to Respondents. (R. 238.) There is no evidence of any fraudulent intent on the part of Respondents, and this is nowhere better demonstrated by the fact that Petitioners did not even try to prove or obtain jury findings on common law fraud. They predicated their suit entirely upon Rule X-10B-5, which does not require proof of fraudulent intent, and they still were not able to obtain a verdict.

6.) The jury has resolved it against them. This Court does not redetermine a fact found by the jury, *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, 369 U.S. 355, 359, 82 S.Ct. 780 (1962);* certainly, it should not do so when, as here, the finding has the concurrence of both the trial court and the Court of Appeals. *Berenyi v. District Director, Imm. & Nat. Serv., 385 U.S. 630, 635, 87 S.Ct. 666 (1967).*

II. Special Issue No. 4: Reliance.

In answer to Special Issue No. 4, the jury found that, in selling their stock for $30.00 per share, Petitioners did not rely upon the non-disclosure of the Newhouse offer. (R. 593.) Neither in the trial court, the Court of Appeals, nor this Court have Petitioners denied that this finding has full support in the evidence. Indeed, at the trial, Petitioners themselves admitted that their reliance was, not upon anything Respondents did or did not do, but upon the expertise of Mr. Hickman (R. 78, 123, 153), who himself testified that he did not consider the Newhouse offer to be material to his appraisal of Petitioners' stock. (R. 249, 250.) Petitioners were "not required to search out details that presumably would not influence the person's judgment with whom they [were] dealing." *Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir., (1963).*

Petitioners contend that the wording of Special Issue No. 4 is unclear (Petitioner for Writ of Certiorari 11), but they suggest no way the jury could have been misled, and we can think of none. Moreover, since this objection was not made in the trial court (or, indeed, in

the Court of Appeals) it cannot be assigned here. *Rule 51, Federal Rules of Civil Procedure; Palmer v. Hoffman, 318 U.S. 109, 119, 63 S. Ct. 477 (1943); Guest House Motor Inn, Inc. v. Duke, 384 F.2d 927, 928 (5 Cir., 1967).*

Nor may Petitioners obtain reversal by claiming now (Petition for Writ of Certiorari 10-12) that they should not have been required to prove reliance at all. In the trial court, Petitioners not only failed to object to the charge on that basis, they tendered the trial court a requested charge which itself would have required them to prove reliance. (R. 581-582)." A party may not allege error in the court's charge when the matter complained of is found in his own requested charge. See *Solomon Dehydrating Company v. Guyton, 294 F.2d 439, 445 (8 Cir., 1961), cert. den., 368 U.S. 929, 82 S.Ct. 366(1961)*, and the many cases there cited.

We should add, however, that, in the type of action alleged by Petitioners, reliance clearly was an element of their proof. It is true, as Petitioners observe, that Rule X-10B-15 "does not by its terms require 'reliance' to be proved" (Petition for Writ of Certiorari 10), but neither does the Rule by its terms give rise to a private civil action. When, as here, the plaintiff has full access

[9] Petitioners asked that the trial court "submit *the special issue on reliance* which was contained in our requested Charge" instead of Special No. 4. (R. 24, emphasis added.) It would seem, incidentally, that Special Issue No. 4 is more favorable to Petitioners than their own requested charge: Special Issue No. 4 inquires only whether Petitioners *relied* upon the non-disclosure in selling their stock for $30.00 per share (R. 593), whereas Petitioners' requested interrogatory on reliance would have required Petitioners to prove that *but for* such non-disclosure Petitioners would not have sold their stock for 30.00 per share. (R. 582.)

to all information in the defendant's possession, but seeks damages or rescission because the defendant failed to mention a fact to him, it is only reasonable that the plaintiff should prove, and the prevailing case law is that he must prove, that he "would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact." *List v. Fashion Park, Inc., 340 F.2d 457, 463 (2 Cir., 1965), cert. den., 382 U.S. 811, 86 S.Ct. 23 (1965).* As said in *III Loss, Securities Regulation, 1766 (2d Ed., 1961),* "it is difficult not to think in terms of reliance as inherent in the very theory of the action when there is no misstatement complained of but merely a breach of a duty to speak." See also *Janigan v. Taylor, 344 F.2d 781, 786, (1 Cir., 1965), cert. den., 382 U.S. 879, 86 S.Ct. 163 (1965); Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir., 1963); Connelly v. Balkwill, 174 F.Supp. 49, 59 (D.C. Ohio, 1959), aff., 279 F.2d 685 (6 Cir., 1960); Reed v. Riddle Airlines, Inc., 266 F.2d 314, 319 (5 Cir., 1959).*

III. Special Issue No. 5: Damages.

Petitioners having alleged that they were damged (R. 569), were properly required to prove it, and this they have never denied. Nor have Petitioners ever in any court (including this one) challenged the jury's answer to Special Issue No. 5 (R. 593-594) that they were not damaged.[11]

[11] Both Mr. Hickman and Mr. Cartwright, securities experts, testified that, at $30.00 per share - which, it will be recalled, was 13.6 times earnings (R. 244) — Petitioners received a fair price for their stock from Respondents, who were the only persons interested in buying it. (R. 249, 440; 238.)

At Petition for Writ of Certiorari, 12-13, Petitioners advance objections to Special Issue No. 5 and to Special Issue No. 6 (which latter Issue was not answered by the jury), but they do not point to any evidence, logic, or authority which could support such objections, and, since the objections were not made in the trial court, they cannot be considered here. *Rule 51, Federal Rules of Civil Procedure.*

IV. Special Issue No. 7: Limitations.

As Petitioners do not and cannot deny, a civil action under Rule X-10B-5 is subject to the defense of limitations. *Bromberg, Securities Law: Fraud, §2.5(1) (1967).* The applicable limitation period is that fixed by the fraud statute of the state in which the federal court sits—two years in Texas, *Quinn v. Press, 135 Tex. 60, 64, 140 S.W.2d 438, 440 (1940)* — and begins to run when the fact allegedly concealed should reasonably have been discovered. *Hooper v. Mountain States Securities Corporation, 282 F.2d 195, 205, 206 (5 Cir., 1960), cert. den., 365 U.S. 814, 81 S.Ct. 695 (1961).* Petitioners brought their suit on January 21, 1966. (R. 550.)[12] The jury found that Petitioners could reasonably have discovered the existence of the Newhouse offer on May 20, 1961 (Special Issue No. 7, R. 594), more than four years and eight months before the suit was filed. Thus, another of the many reasons why Petitioners cannot

[12] Therefore, the trial court correctly stated the law in its instruction (complained of now for the first time in any court at Petition for Writ of Certiorari 13-14) that Petitioners could not recover if it were found by a preponderance of the evidence that they knew or in the exercise of reasonable care should have known of the offer prior to January 21, 1964. (R. 591.)

prevail here is that, by the answer to Special Issue No. 7, the jury has found that their action is barred by limitations and both courts below have concurred in that finding.

Petitioners' present claim that the answer to Special Issue No. 7 was without support in the evidence, is foreclosed by their failure to move for a directed verdict (see *2B Barron & Holtzoff, Federal Practice and Procedure, §1081 (Rev. Ed., 1961)*, quoted at page 13 of this Brief) and is without merit. The Times Herald Printing Company's board of directors met and considered the Newhouse offer on May 20, 1961, and recorded full details thereof in the minutes of such meeting. (R. 305.) At that time, Petitioners were considering a sale of their Company stock for in excess of $1,500,000.00, and an expert of more than thirty years' experience, fully acquainted with the importance of corporate minutes (R. 228, 234), was actively engaged in investigating the Company. Certainly, the jury was entitled to conclude that, in the exercise of ordinary care, either Petitioners or their expert or both should have made an up-to-date examination of the Company's minutes and that, if they had done so, they would have learned, for whatever the information would have been worth to them, of the Newhouse offer.

CONCLUSION

The judgments below that Petitioners take nothing from Respondents, are supported and compelled by each of four separate jury findings, all concurred in by

both the trial court and the Court of Appeals. To obtain relief here, Petitioners would have to overcome each and all of these findings. They do not and cannot show that even one of them lacks evidentiary support or that there was any error (let alone prejudial error) in the charge. Moreover, since Petitioners made no motion for directed verdict and no objections to the charge, the jury findings and the charge are procedurally beyond attack.

After a fair trial, the jury, in accordance with its prerogative and duty under the Seventh Amendment, has decided the controlling facts of this case against Petitioners. There, the litigation should end. Petitioners have shown nothing, and there is nothing that could begin to justify review by the Supreme Court of the United States. Respondents pray that certiorari be denied.

Respectfully submitted,

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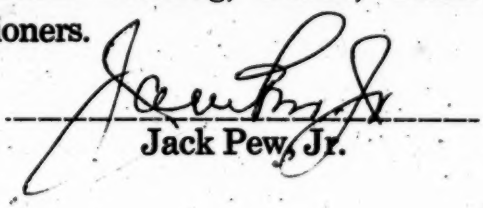
PROOF OF SERVICE

I, Jack Pew, Jr., one of the Counsel for Respondents, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 29th day of March, 1968, I served a copy of the foregoing Respondents' Brief in Opposition by mailing a copy in a duly addressed envelope, with first class postage prepaid, to William F. Billings, Billings, Pierce, Gilley & Stanton, 3030 Fidelity Union Tower, Dallas, Texas 75201, and Robert A. Fanning, Fanning & Harper, 40th Floor First National Bank Building, Dallas, Texas 75202, Counsel for Petitioners.



Jack Pew, Jr.